IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 7

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,

vs.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

MEMORANDUM OF PETITIONERS IN REPLY TO BRIEF OF SOLICITOR GENERAL.

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REPLY TO BRIEF OF SOLICITOR GENERAL.

RATIFICATIONS ARE INVALID BY REASON OF LAPSE OF TIME SINCE THE SUBMISSION OF THE AMENDMENT.

In his brief at page 24, the Solicitor General suggests that the question of what is a reasonable time between submission and action by the legislature upon ratification is not justiciable, that since the Fifth Article of the Constitution does not fix any period of time in which ratification must take place, the question of limitation, if any, is left to congress, and therefore is a political question. He suggests that a limitation to this amendment was proposed in congress and by its refusal to set a

period, congress indicated that no limitation should be placed upon the time within which ratification might take place. We submit that if congress had inserted a period of limitation as it did in the Eighteenth, Nineteenth, and Twenty-first amendments, the court would be bound to accept that period unless, as a matter of law, it could say that the period fixed was unreasonably short or unreasonably long.

The Solicitor General seems to concede that "an amendment can not pend indefinitely" (br. 26). The Second Amendment which was proposed in 1789, dealing with the compensation of members of congress failed at that time and has never received the requisite majority of states. But in 1873 eighty-four years after its proposal the Ohio legislature adopted a resolution of ratification.

This court indicated that that proposed amendment is "outdated" in the case of *Dillon v. Gloss*, 41 S. C. 510, 256 U. S. 368, when it said:

> "* * * As ratification is but the expression of the approbation of the people and is to be effective when had in the three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and, that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted

upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in *1789*, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion *it is quite untenable*. We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal." (Italics ours.)

According to the logic of the Solicitor General's suggestion, this second amendment, relating to the compensation of members of congress, still hangs suspended in the air because congress fixed no period of limitation; it is still an unsettled question, open to ratification by the several legislatures; it cannot die by lapse of time and the court cannot determine that a reasonable time has expired because, as he says, *the question is not justiciable*. This is quite repugnant to the statement above quoted from *Dillon v. Gloss*. If his contention be correct, there was no occasion for the discussion in *Dillon v. Gloss* of the question of whether or not seven years was reasonable, because that question is purely political; the court has no business to consider it. If his contention be correct, then congress might fix a period of fifty years for ratification, and, however absurd it might be as applied to the particular amendment, the court could not

say that it was an unreasonably long time. But if such an absurdly long period so fixed by congress is justiciable, then, of course the entire failure to fix any period is also justiciable.

This leads us to attempt to answer the question propounded by the Chief Justice during our argument, asking us to indicate what criteria might be used by the court in fixing a period of limitation.

We suggest:

(1) A period of at least two years should be allowed so that every legislature throughout the country will have convened and had an opportunity to pass upon the proposed amendment.

(2) Six years would not seem to be unreasonably long so that during that period every senator, as well as every congressman who voted for the proposal will have gone through an election and had an opportunity to explain to his constituents the reason for his vote for or against the proposal. This would be a period of public argument for and against the amendment.

(3) Seven years has been used by congress as a reasonable period in submitting three separate proposed amendments and has been declared by this court to be a reasonable period. This is a legislative declaration.

(4) One year, six months, and thirteen days is the average time used by the people in passing upon

amendments which have been ratified by congress since the first ten amendments.

(5) Three years, six months, and twenty-five days is the longest time used in ratifying any amendment ever proposed.

(6) The nature and extent of publicity and the activity of the public and of the legislatures of the several states in relation to any particular proposal should be taken into consideration.

This leads to the consideration of the facts surrounding the Child Labor Amendment.

It was proposed in January, 1924. On April 20, 1935, the Department of State released a summary of the records of the department showing the action taken on the proposed amendment by the respective legislatures and reported to the Department of State. (Tr. of Record, pp. 13-18.) This release was admitted as correct and is the basis for a chart attached to the brief for respondents in *Chandler v. Wise*, No. 14, and shown as Appendix A. From this chart it appears that in 1924 Arkansas ratified the amendment; Georgia, Louisiana, and North Carolina rejected it. In 1925, Arizona, California and Wisconsin ratified it; the following states rejected it: Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West

Virginia and Wyoming. In 1926 Kentucky and Virginia rejected it. In 1927, Montana which rejected it in 1925 ratified it and Maryland rejected it. In 1928, 1929, and 1930 no action was reported to the Department. In 1931 Colorado, which had in 1924 rejected the amendment, voted to ratify. In 1932 no action was reported. So that from the records of the Department, eight years after the proposal, only six states had ratified the amendment and thirty-eight states had rejected the amendment, with two changes leaving a net of thirty-six if changes be allowed.

The Solicitor General obtained additional information of action taken in the respective legislatures but not reported to the Department of State. That action is summarized in Appendix A to his brief. In that table the asterisks show the same ratifications as the Allen table. "Jp. 2" indicates that a resolution or bill for rejection had passed each house. According to the table, in 1924 such positive action was taken in one state; in 1925, in fifteen states; in 1926, in two states; in 1927, in one state, making a total of nineteen states in which the vote was to reject the amendment. In addition, to this, there were four states, marked "Rd. 2" which indicates that a resolution or bill for ratification was defeated in each house of the respective legislatures. In the year 1925, the states of Connecticut and Delaware acted, and in 1927 Pennsylvania defeated such a resolution, so that by the end of the year 1927, we have nineteen states which adopted a bill or resolution to reject and four states in which a resolution to ratify was defeated in each house,

or a total of twenty-three states, with only five ratifications at that time, and only one thereafter up to and including the end of 1932. The same table shows that by 1931 every state in the union, with the sole exception of Alabama, had had the proposal to amend under consideration, so that at the end of eight years, which is a longer period that has ever been fixed for ratification, and twice as long as the longest time used in ratifying any amendment, this proposed amendment had been under consideration throughout the whole country, with the single exception of Alabama, and had secured only six ratifications and had been in effect rejected by forty-one states.

Applying the above criteria which we have suggested to the Child Labor Amendment, together with this history of consideration, and rejection it occurs to us that there should be no hesitation in declaraing that an unreasonable time had elapsed in 1932, before the new drive was made to secure ratification. This was an expression of the will of the people contemporaneous with the time of the proposal of congress in 1924. It seems to us untenable to contend that that expression could now be set aside by the expression of the people taken at a much more remote period beginning with 1933, nine years after the proposal, and extending to 1937, and still eight short of the requisite thirty-six. More refusals than ratifications have been cast every year since 1933. The people should be given surcease from these annual drives to break down the expressed will of opposition by a decree that a reasonable time has been consumed.

And so the proposed amendment was dead. Dead as Old Marley. The vote was cast overwhelmingly against the proposal. It was a deliberate, well-considered vote which in any parliamentary proceeding would be regarded as decisive. It represented a determined resistance on the part of the people against placing the labor of their children in the hands of a remote congress instead of leaving it under the local control of the states. The matter would never have been revived except through a resubmission by congress were it not for that pernicious doctrine born in reconstruction days that an "aye" is an eternal aye, unchangeable as the law of the Medes and the Persians, but that a "no" is always a negative pregnant with a possible "yes" which can be brought forth through whispered wooings or swift and strong attack. Under this doctrine, the people of any particular state, resting assured that their positive repudiation settled the matter, might be made the object of concentrated effort until, their resistance worn down, a final and reluctant consent could be recorded. In the meantime every affirmative vote is put away in cold storage to await the addition, one by one, whenever and however an affirmative vote can be obtained.

In the last five years, including 1938, eight additional affirmative votes have been obtained. Another eight are still needed. Another five years will bring us to 1943. The final victory, if it should be then attained, would date twenty years from the time the amendment was proposed by congress—a whole generation. This will not

be contemporaneous with the submission and could scarcely be said to be just another step in a single endeavor.

CONCEPT OF REJECTION.

The Solicitor General at page 7 says: "The concept of rejection is extra-constitutional. If that concept is introduced as a constitutional limitation, the effect will be confusion and uncertainty." On page 11 he suggests that "If the concept of rejection is once imported as a constitutional limitation on further action by a legislature, it is necessary to define the concept."

A concept of rejection is inherent in Article V. A proposal is submitted to the legislatures for a vote. It does not seem reasonable that only the ayes should be recorded. As stated by Senator Smith (see our Brief, pages 27, 28):

> "The power to reject is in all respects parallel to the power to ratify." ***
>
> "The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes before it in the form of a new proposition to amend the Constitution."

The power to reject is inferentially recognized by this Court in *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. C. 486, wherein it is stated:

> "The referendum provision of state constitutions and statutes can not be applied consistently with the

constitution of the United States in the ratification *or rejection* of amendments to it."

The Solicitor General is disturbed about the difficulty in arriving at a definition of the term "rejected". (His brief, 12.) We need indulge in no refinement of definition here because in the case at bar there can be no doubt about the action taken by sixteen states (more than one-fourth of all the states), each of which adopted a resolution to reject the amendment and sent its vote for record to the Department of State. At the end of seven years the vote still stood, sixteen to reject, six for ratification, (ten not voting) and sixteen states expressing their dissent in a less positive way.

SHOULD ACTION BE TAKEN BY JOINT SESSION OF THE TWO HOUSES?

Mr. Justice Black asked the Solicitor General during his oral argument whether in the election of United States senators the legislatures of the several states acted in joint session or separately. It is our recollection that the election of United States senators was in joint session and not in separate sessions. The inference may be that in considering the ratification of a proposed amendment, the legislatures should act in joint session. If that be true, then the Kansas legislature did not act properly and the action in the two separate houses is void. It can hardly be said that the separate action of the two houses would necessarily be the same as the action of a joint session, because the debate might change the vote.

We understand that generally if not always in considering the proposed amendments the legislatures of the respective states have acted in separate houses, as was done in Kansas and Kentucky.

THE MEANING OF THE WORD "LEGISLATURE."

The Solicitor General in oral argument stated that the term "legislature" is used many times in the federal Constitution and that it could not in that document mean one thing in one place and another thing in another place. This court has held quite to the contrary. In *Smiley v. Holm*, 285 U. S. 355, 52 S. Ct. 397 (l. c. 399), reference is made especially to the definition of "legislature" as stated in *Hawke v. Smith*, 253 U. S. 221, and the Chief Justice then says the term was not one

> "of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. *** Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by article 1, §4, is that of making laws."

Incidentally, the Kansas Constitution says:

> "Art. 2, Sec. 1, The legislative power of this state shall be vested in a house of representatives and senate,"

and then defines the senate and house. (See our Brief 4.)

CONCURRENT RESOLUTION.

The Solicitor General in oral argument referred to some Kansas decision respecting concurrent resolutions and the reapportionment or redistricting of the states for election of United States senators and congressmen. We believe that the Solicitor General was referring to the above case of *Smiley v. Holm*, which came up to this court not from Kansas, but from Minnesota. That case did not involve a concurrent resolution but involved redistricting a state and the primary question as to whether the function contemplated by Article I, Sec. 4 of the federal Constitution is that of making laws. It was held that it did embrace authority to provide a complete code for congressional elections. It also decided that whether the governor of the state, through veto power, should have a part in making the state laws is a matter of state policy.

It is possible, however, that the Solicitor General had in mind the case of *State v. Knapp*, 102 Kan. 701, wherein the Supreme Court of the state held that an act erroneously entitled "House Concurrent Resolution" "where it has received the treatment of such a bill or joint resolution and has every characteristic thereof except that it describes itself as a concurrent resolution, and contains

the words, 'Be it resolved by the house of representatives of the State of Kansas, the senate concurring therein', instead of the constitutional formula for an enacting clause, 'Be it enacted by the legislature of the State of Kansas' may be regarded as a law." This resolution was approved by the governor, the vote of the members was recorded, and it was published in the statute books. Even under this state of facts, two of the justices filed vigorous dissenting opinions, which were joined in by a third justice.

We do not see that this has any bearing upon the case at bar.

The learned brief and able argument of the Solicitor General have not convinced us that we are wrong. We still believe that the order of this court should be to remand the case with a direction to enter judgment for the petitioners on the following grounds:

1. The lieutenant-governor not being a member of the legislature was not entitled to vote under Article 5 of hte Federal Constitution, and the resolution therefore did not pass.

2. Kansas having in 1925 passed a positive resolution to reject the amendment and said vote having been recorded with the Department of State, and the legislature so acting having adjourned sine die, the Kansas legislature of 1937 had no power to act upon the proposed amendment unless and until it should be resubmitted by congress.

3. More than one-fourth of the states having adopted a positive resolution to reject the amendment and said vote having been recorded with the Department of State as early as 1926, the proposal to amend was defeated and was not open to further consideration by any of the states, and the resolution to ratify was therefore improperly brought before the legislature in 1937.

4. The proposal to amend the constitution having been submitted by Congress in 1924, more than seven years having expired in 1932, the proposal having been considered and acted upon in all of the states of the union in one form or another with the exception of one state, and the vote upon said amendment at that time standing only six for ratification and a repudiation in one form or another by all the other states, it appears that a full consideration of the proposal had been had and that a reasonable time had elapsed and the

proposition was thereafter not open to consideration by any of the states.

Respectfully submitted,

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